

IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT JAIPUR BENCH JAIPUR.

S.B. CIVIL WRIT PETITION NO.6046/2007.

Devendra Singh

Vs.

Additional District Judge (Fast Track) No.7,
Jaipur City Jaipur and ors.

Date of order:- 22/10/2007.

PRESENT

HON'BLE MR.JUSTICE MOHAMMAD RAFIQ

Shri Kamlakar Sharma for the petitioner.
Shri Devendra Singh Raghav for the
respondents.

Reportable

The petitioner has challenged the order dated 4/7/2007 passed by the learned Additional District Judge (Fast Track) No.7, Jaipur City, Jaipur whereby that court allowed the application of the respondent Sumer Singh filed under Order 23 Rule 1A of the Code of Civil Procedure, 1908. The

application was filed on the premise that original plaintiff in the month of July 2006 left for abroad and it is not known as to when would she return back. The suit which has been filed by her is for partition of ancestral properties by meets and bounds wherein applicant was one of the defendants. The plaintiff being not in the country has not instructed her lawyer and the proceedings of the suit have come to a stand still. In fact, the plaintiff has lost complete interest in the matter. The trial court allowed the application and directed that apart from the original plaintiff, applicant Sumer Singh shall also be added as one of the plaintiffs.

2) Shri Kamalakar Sharma, learned counsel for the petitioner argued that an application

of this nature could be allowed only when a suit is withdrawn or abandoned by the plaintiff and the defendant applies to transpose himself as a plaintiff in his application under Rule 10 of Order 1 CPC and in that case too, the court shall have to consider whether the applicant has a substantial question to be decided as against any of the defendants or not. It was argued that defendant No.5 Sumer Singh had earlier filed a civil suit in the year 1962 for partition which was decreed by the order of the court on 25/9/1963. He is therefore now estopped by the principles of *res judicata*, to file a suit. He is trying to get himself impleaded as plaintiff by a circuitous route which is not permissible in law. It was argued that Sumer Singh after having received

a share and thereafter sold it out is now trying to set out a fresh claim. Shri Kamalakar Sharma relied on the judgment of Hon'ble Apex Court in **Kale and others Vs. Deputy Director of Consolidation and others : (1976) 3 SCC 119.**

3) On the other hand, Shri Devendra Singh Raghav, learned counsel who entered his appearance by caveat on behalf of respondent No.5 argued that the trial court has not committed any error of law in passing the impugned order inasmuch as, the plaintiff now having been left the country is now no longer interested in the ancestral property. He argued that in the case of partition suit, every member of family is allowed to claim his share in the property. He relied on the judgment of this Court in **Manohar Singh Vs.**

Master Sardar Bai and ors. : AIR 1987 Raj. 177 and argued that this Court in that case held that even a defendant can be transposed as plaintiff and the suit can be continued if the plaintiff has lost interest. He also cited the judgment of Karnataka High Court in *Goramba Vs. Hajappa and others : AIR 2000 Karnataka* for the purpose of same analogy. He further argued that whether or not in view of impleadment of defendant No.4 as plaintiff, suit is barred by the principles of *res-judicata* and further the question whether he has already received his share in the property, are purely the questions which shall be decided by the trial court on appreciation of evidence and the law. The validity of the impugned-order cannot be challenged on that count.

4) Although, the plaintiff and other defendants in the suit have also been impleaded as respondents in the present petition, their service is not considered necessary and it is also not necessary to issue notice because the impugned order has been passed on application filed by the respondent No.5, Sumer Singh who is the only contesting and effected party in the matter. He therefore, prayed that the writ petition be dismissed.

5) I have given my thoughtful and anxious consideration to the rival submissions made at the bar.

6) In order to appreciate the aforesaid arguments of the learned counsel for the parties, it would be apposite to extract the

provision of Order 23 Rule 1A of the CPC which is as under:-

"Order 23 Rule 1A. When transposition of defendants as plaintiffs may be permitted.- Where a suit is withdrawn or abandoned by a plaintiff under rule 1, and a defendant applies to be transposed as a plaintiff under rule 10 of Order 1, the Court shall, in considering such application, have due regard to the question whether the applicant has a substantial question to be decided as against any of the other defendants."

7) A bare reading of the aforesaid provisions would make it clear that the transposition of a defendant as plaintiff is permitted to be made only in two eventualities. Firstly, when where a suit is withdrawn by the plaintiff and secondly, when the plaintiff has abandoned the suit. In doing that also, the court has to examine

whether the applicant has a substantial question to be decided as against other respondents or not. But even if, the question that applicant Sumer Singh has already received his share in the property may have some substance, that she cannot go into at this stage. Controversy raised in this matter can be decided on the other aspect alone and that is that the transposition of a defendant as plaintiff can be justified in law only when the original plaintiff has either withdrawn the suit or has abandoned the same. In the present case, a perusal of the order does not reveal any discussion or finding by the trial court on either of these two. While the trial court has recorded the fact that the plaintiff did not seek to withdraw the suit is untenable, a question whether she has

abandoned the suit has also not been considered and decided by the trial court. Moreover, the application which was filed by defendant No.4 Smt.Daulat Kanwar was for getting herself transposed as plaintiff and the original plaintiff Smt.Ummed Kanwar as defendant No.4. Obviously that prayer was made keeping in view the scope of Order 23 Rule 1A CPC which provides for transposition of a defendant against plaintiff. The word 'transposition' has been explicitly explained in Marriam-Webster's Collegiate Dictionary, Eleventh Edition as under:-

"An act, process, or instance of transposing or being transposed."

8) The transposition thus implies the transfer of the defendant from one site as plaintiff to the other with a corresponding

change of the plaintiff as the defendant. In other words, this is an inter-change of the plaintiff and the defendant. The defendant who is sought to be transposed substituted as plaintiff whereas the plaintiff is relegated to his place. What has in fact been done in the present case by the trial court is not the transposition of the plaintiff but addition of one more plaintiff. While the original plaintiff Smt.Ummad Kanwar has been still retained as another plaintiff, defendant Sumer Singh has also been added as her co-plaintiff which is plain and simple, contrary to the legislative intent as is revealed from the language of Rule 1A of Order 23 CPC. The object behind praying transposition of a defendant as a plaintiff is to fill the void created by departure of

plaintiff either when he/she has been withdrawn from the suit or when he/she abandoned the suit.

9) The judgment of this Court rendered by the Single Bench in Manohar Singh supra cited by the learned counsel for the respondent cannot be applied to the present case. In that case too, it was held that defendant can be transposed as plaintiff and the plaintiff as defendant. It is evident from para 2 of the report of the aforesaid judgment that in that case the plaintiff had sought to withdraw from the suit. Similarly, the judgment of the Karnataka High Court in Smt.Guruganba supra was also delivered in a situation where the plaintiff sought to withdraw his suit at the stage of completion on evidence of the parties. After the

evidence was complete, the matter was ripe for final arguments. Those judgments are therefore distinguishable and ratio thereof projected upon the facts of the present case.

10) In view of what has been discussed above, in my considered view therefore, the order passed by the learned trial court is not in conformity with the law and therefore the same is liable to be set-aside.

In the result, the writ petition is allowed. The impugned order of the trial court dated 4/7/2007 is quashed and set-aside.

(MOHAMMAD RAFIQ), J.

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